

**Shine Building Maintenance, Inc. and Service Employees International Union, Local 1877, AFL-CIO, CLC.** Cases 32-CA-11580 and 32-CA-11580-2

October 17, 1991

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS OVIATT  
AND RAUDABAUGH

On June 28, 1991, Administrative Law Judge James M. Kennedy issued the attached decision. The Charging Party (Union) filed exceptions, and the General Counsel filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has reviewed the record in light of the exceptions and brief, and has decided to affirm the judge's rulings, findings, and conclusions, to modify the remedy,<sup>1</sup> and to adopt his recommended Order.

The Union excepts to the judge's approval of the informal settlement agreement between the General Counsel and the Respondent in Case 32-CA-11580, in which the complaint alleged numerous violations of Section 8(a)(1) and violations of Section 8(a)(3) by the discriminatory discharge of employees Andres Fernandez, Gabriel Ochoa, and Leonarda Pineda, and refusal to hire Lazaro Ramirez.<sup>2</sup> The complaint in Case 32-CA-11580 also alleged the discriminatory discharge of employee Eva Guzman. Although the issues concerning Guzman's discharge were not made part of the settlement agreement, the judge allowed the Respondent to withdraw its answers to complaint allegations concerning her, and then entered a default judgment, finding that she was discharged in violation of Section 8(a)(3) and ordering that she be reinstated and made whole.<sup>3</sup>

Concerning Guzman, the Union asserted at the hearing, in its interim appeal, and generally in its exceptions, that by agreeing to a default judgment, the Gen-

eral Counsel and the Respondent have tacitly arranged for the Respondent to pay Guzman less than full backpay by persuading the Regional Director that backpay for Guzman was tolled by a purported reinstatement offer that the Union contends was ineffective.<sup>4</sup> We note, however, that Guzman will be entitled to a supplemental hearing if the issue of the tolling of her backpay period remains in dispute or other backpay issues arise with respect to her. Therefore, we find nothing improper in the conduct of the Respondent and the General Counsel agreeing to the entry of a default judgment with respect to her, or in the judge's approval of that procedure and deferring litigation of any backpay issues relating to her to the compliance stage of this proceeding.

The hearing transcript and the Union's interim appeal indicate that its exception to the partial settlement agreement in Case 32-CA-11580 is based on the fact that the agreement does not provide discriminatees Fernandez, Ochoa, Pineda, and Ramirez with the full amount of backpay owed to them, or interest thereon.<sup>5</sup>

The settlement entered into by the General Counsel and the Respondent in Case 32-CA-11580 meets the standards set forth in *Independent Stave Co.*, 287 NLRB 740 (1987). Thus, we find that the Respondent's agreement to post and mail notices in English, Spanish, and Portuguese and reinstate the alleged discriminatees with approximately 80 percent of backpay substantially remedies the unfair labor practices which are the subject of the settlement. Further, the Respondent does not have a history of violating the Act, and there is no evidence that it has breached settlement agreements in the past. Therefore, we find that it will effectuate the purposes and policies of the Act to give effect to the settlement agreement in Case 32-CA-11580, and we shall affirm the judge's approval of that settlement.

ORDER

The National Labor Relations Board affirms the judge's approval of the settlement in Case 32-CA-11580, and adopts the recommended Order of the administrative law judge in Case 32-CA-11580-2, and

<sup>1</sup> Interest on discriminatee Eva Guzman's backpay shall be calculated in accordance with *New Horizons for the Retarded*, 283 NLRB 1173 (1987), rather than *Florida Steel Corp.*, 231 NLRB 651 (1977), which the judge cites in the remedy section of his decision.

We find no merit to the Union's exception to the judge's failure to order that the Respondent bargain in good faith with the Union on the asserted ground that the Respondent's numerous and serious unfair labor practices have prevented it from securing majority status. See *Gourmet Foods*, 270 NLRB 578 (1984) (no bargaining order given as a remedy for unfair labor practice unless union at one point obtained a majority).

<sup>2</sup> The Union opposed the settlement agreement. On June 28, 1991, the same day the judge issued his decision, the Union filed an interim appeal of his approval of the settlement agreement. The Board denied the appeal on July 16, 1991.

<sup>3</sup> The judge remanded Case 32-CA-11580 to the Regional Director to monitor compliance with the settlement agreement, and renumbered the Guzman case 32-CA-11580-2.

<sup>4</sup> The Union does not except to the judge's findings that Guzman was discriminatorily discharged or to his recommended Order.

<sup>5</sup> Not the hearing, and in the interim appeal, the Union further objected to the settlement agreement because it was an informal rather than a formal settlement agreement, which provides for the entry of a Board Order and a consent court decree. Its objection was based in part on the fact that the General Counsel and the Respondent likewise informally settled Case 32-CA-11719, which initially had been consolidated for hearing with Case 32-CA-11580. The complaint in Case 32-CA-11719 alleged the Respondent's discriminatory reduction of work hours and a constructive discharge. The Union makes no mention of the settlement of Case 32-CA-11719 in its exceptions, and in any event, we do not deem the informal settlement of that case to be a basis for disapproving the settlement in Case 32-CA-11580.

orders that the Respondent, Shine Building Maintenance, Inc., Santa Clara, California, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

*George Velastegui, Esq.*, for the General Counsel.

*Amy J. Lambert and Simao J. Avila, Esqs. (Littler, Mendelson, Fastiff & Tichy)*, of San Jose, California, the for Respondent.

*Paul Supton, Esq. (Van Bourg, Weinberg, Roger & Rosenfeld)*, of San Francisco, California, for the Charging Party.

## DECISION

### STATEMENT OF THE CASE

JAMES M. KENNEDY, Administrative Law Judge. This case was opened before me in San Jose, California, on June 25, 1991, on a complaint issued by the Regional Director for Region 32 of the National Labor Relations Board on March 20, 1991. It was later amended on June 7, 1991. The complaint is based on a charge filed by Service Employees International Union, Local 1877, AFL-CIO, CLC (the Union) on December 19, 1990. It alleges that Shine Building Maintenance, Inc. (Respondent) has committed certain violations of Section 8(a)(1) and (3) of the National Labor Relations Act.<sup>1</sup>

Respondent filed an answer to the amended complaint admitting certain procedural matters but denying the substantive allegations.

After I approved the settlement described in footnote 1, the parties then entered into additional settlement discussions regarding Case 32-CA-11580. Eventually they signed a Board informal settlement agreement covering most of those matters as well. However, one issue was unresolved, whether backpay had been tolled for alleged discriminatee Eva Guzman by mailing a letter to her. As the parties were unable to agree, and as the Board's do not clearly permit the litigation of a compliance matter prior to a Board order (see the Board's Rules and Regulations, Sec. 102.54(b)) the parties agreed that the best way to handle that issue would be to allow a default order to be entered with regard to her. Accordingly, Respondent withdrew that portion of its answer to the amended complaint relating to Guzman. I thereupon approved the informal settlement which had been reached, renumbered the Guzman portion as Case 32-CA-11580-2, severed the two and remanded the settled case, Case 32-CA-11580, to the Regional Director for supervision of compliance, including closure of the case on compliance.<sup>2</sup> Accordingly, based on the procedural admissions made in its answer to the amended complaint and pursuant to Board Rules, Sec-

tion 102.20, regarding the now undenied allegations relating to Guzman, I make the following

### FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Respondent is a California corporation with an office and place of business in Santa Clara, California, where it is engaged in the business of providing janitorial services to nonretail customers.

2. During the past 12 months, Respondent, in the course and conduct of its business, has sold or shipped goods or provided services valued in excess of \$50,000 directly to customers or business enterprises who themselves meet one of the Board's jurisdictional standards other than its indirect inflow or indirect outflow standards.

3. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

4. The Union is a labor organization within the meaning of Section 2(5) of the Act.

5. On October 1, 1990, Respondent discharged its employee Eva Guzman in breach of Section 8(a)(3) and (1) of the Act.

### THE REMEDY

Having found Respondent to have engaged in certain violations of the Act, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. The affirmative action shall require Respondent, to the extent it has not already done so, to offer Guzman immediate reinstatement to her former job, dismissing, if necessary, any replacement, or, if that job no longer exists, to a substantially equivalent position without prejudice to her seniority or other rights and privileges and to make her whole with interest for loss of earnings as described by the Board in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and *Florida Steel Corp.*, 231 NLRB 651 (1977). See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962). In addition, Respondent shall be required to expunge from its records any reference to her discharge and to provide Guzman with written notice that the records have been expunged and that the discharge will not be used as a basis for any personnel action against her.

Based on these findings of fact, conclusions of law, and remedy, and I issue the following recommended<sup>3</sup>

### ORDER

The Respondent, Shine Building Maintenance, Inc., Santa Clara, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise affecting the hire and tenure of employees because of their activities protected by Section 7 of the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

<sup>1</sup> A second case, Case 32-CA-11719, was consolidated by an order of the Regional Director dated May 7, 1991. On the opening of this matter, the General Counsel in that case submitted a Board informal settlement agreement for my approval over the objection of the Charging Party. On review of the settlement, I determined that it should be approved and did so, thereafter severing Case 32-CA-11719 and remanding it to the Regional Director for supervision of compliance including closure.

<sup>2</sup> As with Case 32-CA-11719, discussed in fn. 1, the Charging Party has refused to join the settlement in Case 32-CA-11580. I permitted the Charging Party to argue against approval, but was not persuaded that its argument had merit.

<sup>3</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Eva Guzman immediate and full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed, and make her whole for any loss of earnings and other benefits suffered as a result of her discharge, in the manner set forth in the remedy section of the decision.

(b) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Remove from its files any reference to the unlawful discharge of Guzman and notify her in writing that this has been done and that the discharge will not be used against her in any way.

(d) Post at its office and at its facilities where it performs work copies of the attached notice marked "Appendix."<sup>4</sup> Copies of the notice, on forms provided by the Regional Director for Region 32, after being signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

<sup>4</sup>If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

## APPENDIX

### NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

- To organize
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To act together for other mutual aid or protection
- To choose not to engage in any of these protected concerted activities.

WE WILL NOT discharge or otherwise discriminate against any of you for supporting Service Employees International Union, Local 1877, AFL-CIO, CLC or any other union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer Eva Guzman immediate and full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed and WE WILL make her whole for any loss of earnings and other benefits resulting from her discharge, less any net interim earnings, plus interest.

WE WILL notify Eva Guzman that we have removed from our files any reference to her discharge and that the discharge will not be used against her in any way.

SHINE BUILDING MAINTENANCE, INC.